

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**LIDIA C. PINKSTON**  
Claimant

VS.

**VIA CHRISTI REGIONAL MEDICAL CTR.**  
Respondent

AND

**ROYAL INDEMNITY CO.**  
Insurance Carrier

Docket No. **264,162**

**ORDER**

Respondent and its insurance carrier request review of a preliminary hearing Order entered by Administrative Law Judge John D. Clark on April 10, 2001.

**ISSUES**

The Administrative Law Judge determined the claimant sustained accidental injury arising out of and in the course of her employment each and every working day through December 7, 2000, and that respondent had received timely notice.

Respondent raises the following issues on review: (1) whether claimant's accidental injury arose out of and in the course of employment; and, (2) whether proper notice was given.

The claimant contends the Administrative Law Judge's decision should be affirmed.

**FINDINGS OF FACT**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant was employed with Via Christi for three years. She worked in housekeeping and later added hospitality duties in June 2000.

Claimant's housekeeping duties involved using a mop, a rag and a pole to clean the walls in the surgical suites. Claimant was required to use her hands and arms over her head. In June 2000, the claimant received additional duties, labeled as hospitality, which required her to pass trays, ice and water to patients. The trays were on a cart and some of the trays were located above the claimant's head. Claimant was required to reach the tray above her head, distribute the tray to the patient, collect the tray and then return it to the cart. Upon completion of the hospitality duties, the claimant would resume her housekeeping duties.

Over a period of time, the claimant gradually developed pain in her right hand, arm and shoulder. The claimant initially sought medical treatment with her family physician, Dr. Goodwin, in Goddard Kansas. Dr. Goodwin referred the claimant to Dr. Artz due to claimant's continuing complaints and problems with her shoulder.

Claimant advised Gloria Galavis, her team leader, about her work-related injury and informed Ms. Galavis that she had been referred for medical treatment from Dr. Goodwin to Dr. Artz. Claimant testified that she also notified Ms. Amparan, her supervisor, about the shoulder surgery and that the pain in her shoulder was due to her work activities.

On cross-examination, claimant testified that Ms. Galavis was a specialist or team leader but she neither had authority to discipline nor accept formal reports of work-related injury. However, claimant iterated that she notified Ms. Amparan of her shoulder injury before the operation.

Dr. Artz treated the claimant with some injections into the shoulder and ordered an arthrogram which revealed a rotator cuff tear. Dr. Artz prescribed a course of physical therapy and when that did not improve the shoulder condition he thereafter recommended surgery.

The claimant testified that she gave Ms. Amparan the note from Dr. Artz that surgery had been scheduled for December 7, 2000. Dr. Artz performed a rotator cuff repair and kept claimant off work from December 7, 2000, through March 12, 2001.

Claimant completed a short-term disability application on December 29, 2000, and testified that she gave the form to Ms. Amparan. The form contained a question whether the condition was related to work. The claimant marked the answer yes and explained "everyday cleaning, same routine." The claimant also marked the form to indicate that the injury occurred at work.

Carmen Amparan, a housekeeper supervisor at Via Christi, testified that Ms. Galavis was not claimant's supervisor or manager. Ms. Amparan further testified that the claimant

never mentioned to her that the shoulder problems were job-related and if she had, Ms. Amparan would have filled out an accident report.

Ms. Amparan testified that it was late October or the first of November 2000 when claimant told Ms. Amparan that her shoulder was hurting, she was seeing a doctor, and needed surgery. Ms. Amparan did not ask the claimant whether or not the shoulder problem was related to work. Lastly, Ms. Amparan testified that she did not remember seeing the disability application.

### **CONCLUSIONS OF LAW**

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right depends.<sup>1</sup> “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”<sup>2</sup>

An accidental injury is compensable where the accident arose out of and in the course of employment.<sup>3</sup> The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.<sup>4</sup>

The claimant testified that the repetitious nature of cleaning the surgical suites gradually led to an onset of shoulder symptoms which got progressively worse as she continued working. The claimant’s supervisor agreed that cleaning in the operating room required using a long handle wall attachment and using the hands, arms and shoulders in a forceful repetitive manner. The Board finds claimant’s testimony is sufficient to prove causation.

The Workers Compensation Act requires a worker to provide the employer timely notice of a work-related accident or injury.<sup>5</sup>

Respondent contends the claimant's last day of work before the surgery was December 7, 2000, and that her supervisor testified she did not receive notice until after claimant returned to work in March 2001. Respondent also notes that the date the short-

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<sup>1</sup>K.S.A. 44-510(a).

<sup>2</sup>K.S.A. 44-508(g).

<sup>3</sup>K.S.A. 44-501(a).

<sup>4</sup>*Harris v. Bethany Medical Center*, 21 Kan. App.2d 804, 909 P.2d 657 (1995).

<sup>5</sup>K.S.A. 44-520.

term disability form was signed (December 29, 2000) is beyond the 10-day period required for notice.

Dr. Artz's office notes, dated October 30, 2000, state that because therapy had not improved the shoulder the claimant wanted to proceed with surgical repair and that arrangements for surgery would be made. The claimant testified that she gave her supervisor the doctor's note that surgery was scheduled for December 7, 2000. Ms. Amparan agreed that she was advised about the shoulder and prospective surgery in late October or early November 2000.

It is undisputed the claimant and her supervisor discussed the shoulder problems and planned surgery in either late October or early November 2000. The only disagreement is whether the claimant notified her supervisor that the shoulder problems were work-related.

As noted above, there is definitely conflicting testimony in this case. The claimant and her supervisor both testified in person before the Administrative Law Judge. Their testimony regarding notice of a work-related injury is in direct conflict with each other. Thus, credibility is at issue. The Administrative Law Judge had the opportunity to assess the witnesses' demeanor. In this case, the Administrative Law Judge believed the claimant and specifically determined that respondent had notice of claimant's injuries. Under this circumstance, where conflicting testimony exists, the Board finds some deference should be given to the Administrative Law Judge's evaluation of the witnesses' credibility. The Board, therefore, taking into consideration the Administrative Law Judge's opportunity to assess the witnesses' credibility, affirms the Administrative Law Judge's decision that claimant gave timely notice.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated April 10, 2001, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2001.

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BOARD MEMBER

pc: Lawrence M. Gurney, Attorney, Wichita, Kansas  
Eric K. Kuhn, Attorney, Wichita, Kansas  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director